

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**SAM'S CLUB, A DIVISION OF
WAL-MART STORES, INC.¹**

Employer

and

Case 22-RC-12586

**LOCAL 464A, UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC²**
Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended (the Act), seeking to represent a unit of all full-time and regular part-time employees employed in the Meat Department at the Employer's Freehold, New Jersey location, excluding all other employees. The Employer contends that the Petitioner has failed to establish that these employees have a community of interest that is different from the rest of the employees and, accordingly, has failed to overcome the presumption that a wall-to-wall unit is the only appropriate unit in a retail facility. Petitioner also seeks to exclude Meat Department Team Leader Francisco Vargas from the unit because he is a

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

supervisor within the meaning of the Act. The Employer asserts that the Petitioner has failed to establish that Vargas is a supervisor.

Based on the following facts and analysis, I find that: 1] a unit limited to the Meat Department is appropriate and 2] that Francisco Vargas is not a supervisor within the meaning of Section 2(11) of the Act.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴

3. The labor organization involved claims to represent certain employees of the Employer.⁵

4. A question affecting commerce exists concerning the representation of certain employees of the Employer.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described in this decision:

³ Briefs filed by the parties have been considered.

⁴ The Employer is a Delaware corporation engaged in the retail sale of bulk food, other grocery items and various consumer products at its Freehold, New Jersey facility, the only facility involved herein.

⁵ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

All full-time and regular part-time Meat Department employees including Meat Cutters, Meat Packagers, Meat Demo Associates, Meat Maintenance Associates and Meat Department Team Leaders employed by the Employer at its Freehold, New Jersey facility excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.⁶

II. FACTS

A. Background

The Employer is a warehouse selling merchandise to customers who must purchase a membership to be permitted to buy goods. The Employer is a division of Wal-Mart Stores, Inc. The Employer employs 226 employees at the Freehold facility.⁷

The Union filed the petition on March 4, 2005. The Region held a hearing on March 21, 22 and 23, 2005. There is no history of collective bargaining at the facility.

B. The Employer's Operations

1. Organization and Supervisory Hierarchy

The Freehold facility is in the Employer's Region 15, which includes 10 clubs.⁸ Mohammed Kahn, the Director of Operations for Region 15, oversees the region, including labor relations. He reports to the Regional Vice President. Larry Pavlinko is the Regional Fresh Manager who is responsible for the fresh areas within the Region. The Employer includes within the designation "fresh," items sold in the meat, bakery and produce departments, floral areas and cafés in its clubs. Pavlinko is based in New Jersey and visits the Freehold Club approximately every two to three weeks. When he does, he spends roughly 25 percent of his time in the Meat Department, 25 percent in the produce

⁶ There are approximately 14 employees employed in the unit.

⁷ The Employer refers to its employees as "associates."

⁸ The Employer has 54 regions nationwide.

department, 25 percent of his time in the bakery department, 10 percent of his time in the café, 5 percent of his time in the floral area and the remainder on other tasks.

The Club Manager for the Freehold Club is Joseph Kokonaski. He is responsible for labor relations, among other tasks, at the Club. There is a Co-Manager, Mark Montgomery, whose authority is similar to that of the Club Manager, and who fills in for the Club Manager when he is not present. The Club Manager is the final decision maker on hiring, discipline and termination decisions. He finalizes employee evaluations and decides starting rates and pay raises.

The Freehold Club has four Assistant Managers: Trina Rumph, Business Manager, in charge of marketing; Luciana Montilla, Operational Manager, who supervises the “front end,” which includes the cashiers and customer service representatives; Gary Williams, Merchandise Manager I, in charge of the grocery and fresh departments; and Jerold Colonna, Merchandise Manager II, who oversees the tire mounting, receiving and “center area.” The “center area” includes seasonal items, clothing and books.

On a daily basis, Assistant Manager Williams checks the meat display cases but does not necessarily enter the meat room. Three salaried managers report to Mr. Williams: a Meat Department Manager, Produce Department Manager and a Bakery Department Manager. Irwin Cohen is the Meat Department Manager and is salaried. Each of the three fresh department managers may give directions to employees in other fresh departments if the employee’s department manager is not scheduled to work. The three fresh department managers share an office.

Meat Department Manager Cohen spends fifteen to twenty percent of his time in the Meat Department. He checks to make sure that the number of meat products cut is consistent with the Employer's requirements. He also wraps meat and fills display cases.

2. The Physical Facility

The Freehold facility consists of a single building covering 108,220 square feet. The Employer sells all of its merchandise on a common sales floor. The Freehold facility's departments providing services to its members include a Grocery Department, Meat Department, Bakery Department, Produce Department, tire mounting area, jewelry area, café, floral area and center area. The Freehold facility is open on Monday through Saturday from 7 AM to 8:30 PM and on Sunday from 10 AM to 6 PM.⁹ There are two primary employee shifts: 6 AM to 2 PM and 2 PM to 10 PM.

All employees, along with the customers, enter the facility through the entrance located at the front of the Club. At the front of the facility is a membership desk where returned merchandise is also processed. The Employer requires all employees to park in the parking lot near that entrance. When employees start and complete their shifts and breaks, they must use badges to swipe in and out at the Club's front entry. In addition, employees who forgot, lost or are unable to successfully use their badges can obtain assistance at the membership desk. All employees pick up their paychecks in the office of the Personnel Training Coordinator; that individual is responsible for orientation, distributing paychecks and making payroll adjustments.

⁹ Business members, as defined by the Employer, may shop between 7 AM to 10 PM Monday through Saturday.

All employees may use either of two employee lounges, one of which is non-smoking. The Employer posts schedules for employees in the lounges. All employees use the facility's two sets of restrooms.

The Freehold Club includes a room used for employee training and orientation. All employees take the same one-day orientation, which includes classroom training and a tour of the entire facility, including the meat room. All employees also receive training in the training room. A weekly broadcast from the Employer's Arkansas headquarters is presented in the training room and attended by all managers, including the Meat Department Manager.

3. Personnel Policies

a. Hiring

The Employer hires employees by posting openings in the Club and by soliciting outside applicants. The Employer also posts notices of openings in the break rooms. Non-Meat Department employees can bid on Meat Department jobs. The Employer uses a single application form. Hourly employees conduct the first interviews of applicants. An assistant manager or, in the case of the Meat Department, its Manager, conducts second interviews. The General Manager or Co-Manager does the final interview. The Employer requires employees to take a drug test and performs a background check. The Club Manager ultimately decides whether an employee is hired.

b. Wages and Benefits

All employees receive the same employee handbook and have access to the Employer's policies on its intranet. The Employer's pay scale, applicable to all hourly employees, has seven levels or "classes." The Club Manager determines starting pay rates based on experience. The base starting rate is \$8 an hour.

All full-time employees, who work eight-hour shifts, receive the same benefits, as do all part-time employees. All employees are entitled to enroll in the same medical, dental and life insurance plans. All employees are covered by the same vacation policy, holiday pay and personal, bereavement and jury duty leave. All employees are subject to the same policies concerning breaks and meal periods.

All employees are eligible for the Employer's profit-based bonus program. Under that program, the Employer awards bonuses to employees based on the Club's overall profitability. All employees may participate in the Employer's stock purchase program. The Employer matches a percentage of an employee's stock purchases, up to a set maximum. All employees receive memberships at the Club.

c. Evaluations and Discipline

The Employer uses the same evaluation procedure for all employees. It terms an employee's first 90 days an "introductory period," after which an employee receives an evaluation. If the employee's performance has been acceptable as of that time, he or she receives either a 40 or 55 cents hourly raise, depending on the evaluation. The Club Manager signs off on all evaluations. Annual evaluations determine pay raises.

The Employer uses the term "coach" in lieu of the term "discipline." The Employer contends that any salaried manager can coach any employee and provided evidence that a Meat Department employee had been coached by a manager without supervisory authority over the Meat Department.¹⁰ The disciplinary process begins with a verbal coaching and

¹⁰ The Employer cited as an example that an Assistant Manager for Merchandise I "coached" a Meat Department employee, although there is a line of authority between these two employees. See Section B.1, on page 4 above. Francisco Vargas testified that he requested that the Business Manager "coach" a Meat Department employee, but that the requested coaching did not occur. He further testified that the Business Manager subsequently "coached" the employee on an unrelated matter, but did not supply any details concerning the incident.

may proceed to a written coaching. The Employer does not record verbal coaching in an employee's file. The Employer uses the term "decision-making day" to denote a one-day suspension without pay that may follow a written "coaching" and which is a final measure taken short of termination. The Club Manager must approve decisions to give an employee a "decision-making day" or to terminate an employee.

d. Other Personnel Policies

The Employer has a "Ten Foot Rule" that requires an employee who comes within ten feet of a member to greet and assist the member, regardless of whether the member is in the area to which the employee is assigned and regardless of whether the member is looking for a product in the employee's department. As a result, the Employer expects all employees to know the location of products throughout the Club, not just in his or her department. However, a Meat Department employee testified that he has asked employees in other departments for the location of an item if he did not know where to find it.

The Employer also has an "Open Door Policy" under which an employee may discuss a matter with any manager, even if the manager does not directly supervise the employee.

4. The Meat Department

a. Physical Layout

The Meat Department is located towards the back of the Club, near where other fresh items are sold. The Meat Department consists of two display cases and a "meat room," also called the "meat prep room," located behind the meat cases. There are no partitions surrounding the Meat Department, although the meat room is an enclosed room used solely for the preparation of meat products. There are glass windows on the wall behind the display cases enabling customers to look into the meat room. There is no service counter.

The meat room includes four meat tables, a draining table, a piece of equipment called a “wrapper,”¹¹ a meat saw, a grinder and a cooler for the storage of meat.¹² Some meats are stored in the Club freezer, which is located outside of the meat prep room and used for a variety of facility products.

A meat table is an acrylic block in a metal frame. The drain table is used to purge boxed meat of blood. The meat saw is a band saw used to prepare center cut and other chops, country-style pork or butt steaks and T-bone steaks. Employees operate the grinder with a button and a foot pedal to shape the meat.

Meat Cutters do not provide their own tools. In addition to the saw, they use about a dozen cutting or butcher knives, ranging from ten to fourteen inches long, six six-inch boning knives and a cheese knife. They select their own cutting knives, based on personal preference and the product.

Meat Department employees spend most of their work time in the meat room, unless they leave to fill the display cases, demonstrate product samples on the sales floor or assist in the loading area behind the Meat Department. The Employer has no other departments in which employees spend most of their work time in an enclosed room.

The temperature in the meat room is kept between 38 and 40 degrees. Non-Meat Department employees rarely enter the meat room. Meat Department employees do not permit customers to enter the meat room.

Behind the meat preparation room is a staging area where trucks deliver freight for the entire facility, including the Meat Department. Receiving employees unload trucks and

¹¹ A similar wrapping machine in the bakery department is used by bakery department employees to wrap bakery products.

¹² There is a cooler near the meat prep room used for produce storage.

put products, including Meat Department products, that must be stored in a cooler or a freezer directly into one of the Club's coolers or its freezer.

One of the display cases in the Meat Department includes both meat and produce items. The meat items include ground beef, steak, chicken, pork chops, cheese, hot dogs and bacon. The produce items include lettuce, mushrooms, cheese dips and food trays. Meat, produce and grocery department employees stock this case. The second case includes seafood, which the Employer places under the Meat Department, and bakery items. Meat and bakery department employees stock this case.

b. Employees

The Employer employs fourteen employees in the Meat Department: five Meat Cutters, sometimes referred to as Meat Processors or Butchers;¹³ four Meat Packagers or Wrappers;¹⁴ two Meat Maintenance Associates, sometimes referred to as Fresh Maintenance Associates; two Meat Demo Associates, sometimes referred to as Fresh Demo Associates;¹⁵ and a Meat Department Team Leader, Francisco Vargas. Most Meat Department employees work on the 6 AM to 2 PM or the 2 PM to 10 PM shifts.¹⁶ The most experienced Meat Cutters work on the 6 AM to 2 PM shift; some come in at Noon. Meat Wrappers start at 7 AM. Meat Department employees wear white coats and hard hats, with their names on the coats. No other employees wear similar clothing or headgear. Most Meat Department employees wear jackets to keep warm.

¹³ Referred to throughout this Decision as Meat Cutters. The current Meat Cutters are Michael Borgia, Mark Fannelli, Cesar Gavilano, J. Parker Thompson and Joseph Tirpak.

¹⁴ The current Meat Wrappers are Brenda Heredia, Monica (last name not supplied), Maria Santana and Leona Griffin.

¹⁵ The current Meat Demo Associates are Bibi Soto and Maria Estado.

¹⁶ Produce, bakery, receiving, audit and business associates also work the 6 AM to 2 PM shift. Tire, bakery, produce and grocery associates and cashiers also work the 2 PM to 10 PM shift.

i. Team Leader

Meat Department Team Leader Francisco Vargas checks meat display cases to make sure that they contain no expired product, cleans the wrapping machine, determines that the meat room is otherwise clean and wraps meat. He spends approximately ten to fifteen percent of his time in the meat room. He spends about two percent of his time wrapping meat. He does not process meat.

On a daily basis, Vargas testified, he directs Meat Cutters to cut meat in addition to what is on the cut list and to stop cutting meat and perform other tasks; Meat Maintenance Associates to grind meat; and employees to tray fish, fill display cases,¹⁷ remove trash from the meat room and assemble platters. He also directs Meat Cutters to cut meat based on instructions from the Regional Fresh Manager and the amount of meat on hand. He testified that he cannot discipline an employee without approval from a manager.¹⁸ Prior to February 2005, Vargas scheduled employees, but he no longer performs this function; since February 2005, a computer generates employee schedules. He has performed the first interviews for three or four prospective hires in the Meat Department. After the first interviews, he writes comments that he transmits to management. He has interviewed two prospective hires for positions outside of the Meat Department. He wrote the first drafts of employee evaluations and transmitted drafts to management; there was no further evidence of the use made by management of his draft evaluations. There was also no evidence presented that he has the authority to transfer, suspend, layoff, recall, promote or discharge employees or effectively to recommend such actions. Vargas testified that he verbally coached one employee, after

¹⁷ A Meat Cutter testified that the Employer's goal in filling a case is to keep two levels of product in the case.

¹⁸ Meat Cutter Joseph Tirpak testified that when he was the Team Leader in the Meat Department in 2003, he verbally coached employees on two occasions, advising the Meat Department Manager at the time, who is not the current Meat Department Manager, that he was going to give the verbal coaching.

clearing the coaching with a manager. An employee testified that Vargas distributed gift cards to employees; there was no evidence that Vargas had decided the amount of the gift or the recipient. An employee testified that if he were having problems with another Meat Department employee, he would go to Vargas. However, there was no evidence that any employee had approached Vargas with a grievance or how Vargas had responded to any grievance.

Vargas attends meetings on Monday mornings with other Team Leaders and managers. These meetings begin at 11:30 AM and are usually two hours long, covering sales and seasonal items. He uses the office of the Meat Department Manager. Vargas is in Pay Class 7, the highest of the hourly pay classifications,¹⁹ and receives \$21.45 an hour.

ii. Meat Cutters

Meat Cutters cut, grind and trim meat. They also load meat onto plastic trays called “boats” for wrapping, wrap meat, stock display cases, advise customers on the amount or cut of meat they should purchase, relieve the Meat Demo Associates when they go on break and remove and bale boxes. The Meat Cutters and Meat Wrappers who work the morning shift look for expired product in the display cases. In so doing, they may determine that repackaging an unexpired product may encourage its sale.

Witnesses from both parties testified that Meat Cutters on the morning shift spend approximately 80 to 90 percent of their time cutting meat and approximately ten to fifteen percent of their total time grinding meat. One Meat Cutter testified that during the first hour of his shift he also wraps meat. Meat Cutters who come in at Noon spend approximately 50 to 60 percent of their time cutting meat. A manager called as a witness by the Employer

¹⁹ Also included in Pay Class 7 are the Optician Licensed, Team Leader Center Aisle, Audit Lead, In-Store Loss Prevention, Personnel Training Coordinator, Receiving Office, Membership Lead and Team Leader Grocery.

testified that Meat Cutters on the evening shift spend approximately ten to fifteen percent of their time cutting meat. A Meat Cutter who works the evening shift testified that he spends 20 to 25 percent of his time cutting meat.

All Meat Department employees receive departmental training, in addition to training given to all other employees. The Employer requires Meat Department employees to take computer-based training in meat handling that is not given to other employees. The Employer does not require Meat Cutters to have prior experience handling meat. The Meat Cutters learn from other Meat Cutters. The Employer has no apprenticeship program. Two Meat Cutters started out as Meat Packagers. Two other Meat Cutters started out as Meat Maintenance Associates. A Meat Cutter testified that when he became a Meat Cutter, after working for two to three weeks as a Meat Wrapper, it took him six months to learn meat cutting. Another Meat Cutter testified that it took about two to three years while he was working as a Maintenance Associate to learn meat cutting

Meat Cutters are in Pay Class 6, which is next to the highest of the seven pay levels.²⁰ One Meat Cutter hired in 2001 makes \$16.25 an hour.

iii. Meat Wrappers

Meat Wrappers take meat products prepared by the Meat Cutters, place them on trays and use the wrapping machine to wrap the trays. Using the wrapping machine involves keying in a number on the machine, which then automatically wraps the meat.²¹ Meat Packagers also grind meat, stock display cases, check for expired meat and perform “demos,” i.e., preparing and offering samples of product to members. Meat Wrappers must learn

²⁰ Also included in Pay Class 6 are Jewelry Lead, Optician Certified, Optician, Pharmacy Tech II, Pharmacy Tech III, Café Lead, Accounting Lead, Claims, Check Out Supervisor, Advantage Coordinator, New Business Member Representative, Forklift Maintenance, Receiving Lead, Fresh Team Leader Bakery and Produce Lead.

²¹ Wrapping performed in the Meat Department is similar to wrapping performed in the bakery department, where there is also a wrapping machine.

different cuts of meat. It takes Meat Packagers about one to two weeks to learn their jobs.²² They are in Pay Class 2.²³ One Meat Packager hired in 1999 makes \$14.40 an hour.

iv. Other Employees

The Meat Demo Associates prepare and offer meat product samples to members on the sales floor.²⁴ Meat Demo Associates usually demonstrate product near the Meat Department, but occasionally station themselves in other areas. Meat Demo Associates also wrap meat and help fill display cases. It takes approximately two to three hours to learn to be a Meat Demo Associate. Meat Demo Associates are in Pay Class 2. One Meat Demo Associate hired in 2004 makes \$9.25 an hour.

The Meat Maintenance Associates clean the Meat Department, stock display cases, dispose of garbage and sometimes wrap or grind meat.²⁵ It takes one to two weeks to learn the job. Meat Maintenance Associates are in Pay Class 1.²⁶

c. Products

The Employer, as a wholesale club, sells larger cuts of meats than in a typical grocery store. The Employer asserts that therefore, the meat it sells requires less cutting than that sold by a typical grocery store.

The Meat Department sells fresh beef, pork, chicken and seafood, frozen seafood, deli meats and cheeses, pre-packaged salads, dips, spreads and olives. Meat sales are about 93

²² The Regional Fresh Manager testified that it takes the same amount of time to learn the job of Packager in the Bakery Department.

²³ Also included in Pay Class 2 are the Pharmacy Stocker, Vision Care Associate, Demo Associate, Rotisserie and Wrapper Bakery.

²⁴ There are other Demo Associates who work in the Demo Department with products other than meat. There is a demo associate assigned to the bakery department.

²⁵ There are maintenance employees in other areas of the Club, such as the bakery department. Maintenance Associates in the Club have similar duties apart from handling meat. They clean different equipment in each department.

²⁶ Also included in Pay Class 1 are Parking Lot Patrol, People Greeter, Cart Associate, Off Duty Security Guard and Fresh Maintenance Bakery.

percent of Meat Department sales. The other approximately seven percent consists of cheese, none of which is processed or sliced in the Meat Department. Employees take cheese out of boxes kept in the cooler to place in display cases.

Some meat that arrives in the department does not require processing. For example, employees remove fresh fish and deli meats from boxes, put these products onto trays and wrap the “trayed” products. About 67 percent of the meat products sold by the Meat Department are either case-ready or involve no cutting.

About 33 percent of the products sold by the Meat Department require some processing using a knife, saw or grinder.²⁷ The Employer contends that of this 33 percent, some products, approximately 10 percent of the department total, do not require significant processing. For example, boneless pork roast arrives at the Meat Department in an approximately 30 to 40 pound box containing six packages of meat. According to the Employer’s witness, cutting a boneless pork roast involves cutting a pork loin in half and tying it with a string. However, a Meat Cutter testified that he cuts a pork loin into three sections to cut roasts. Ground beef arrives at the department in a tube already ground.

Meat that must be processed arrives in the Meat Department as “boxed meat” rather than on carcasses. Boxed meat is packaged in cryovac wrapping which must be opened before the meat can be further processed. The table below represents the boxed meat received in the Meat Department which is then cut, sliced or processed by Meat Cutters in the meat room as follows:

²⁷ This figure is based on sales for a week in March 2005. The Petitioner contends that the figure may under represent the sale of processed meat because less processed meat is sold in March than in the summer and at holiday times, and that in March, more prepackaged corned beef is sold due to St. Patrick’s Day. In the week at issue, corned beef accounted for 5% of Meat Department sales. The Regional Fresh Manager testified that the ratio of processed to pre-processed meat remains constant.

Boxed Meat

Cut, Sliced or Processed Into

Boneless Pork Loins	Pork chops, boneless back ribs and pork loin roasts
Pork With Bone-In	Center cut pork chops, country-style ribs and “assorted chops”
Beef Boneless Loins	Strip steaks
Boneless Beef Rib-Eye	Rib-eye steaks
Boneless Sirloin	Sirloin steaks
Beef Bone-In Loins	T-bone and boneless strip steaks
Beef Chuck	Chuck steaks and roasts
Beef Round	London broil
Beef-Eye Round	Eye steaks and roasts
Lamb Loins	Pieces
Pork Ribs	Pieces
Whole Beef Briskets	Pieces
Cooked Prime Rib	Steaks

Regional Fresh Manager Pavlinko testified that the Meat Department Manager or the Meat Department Team Leader provides the Meat Cutters with a “cut list” to determine how much and what cuts of meat to cut. He testified that these managers generate the cut list depending on inventory and past sales. Meat Cutter Joseph Tirpak testified that prior to two to three weeks before the hearing, he prepared the cut list 20 percent of the time and Meat Cutter Michael Borgia prepared the list the rest of the time. He testified that the Meat Cutters prepared the cut list using a computer program into which managers had supplied the total number of cuts of meat that had been sold the previous month. The Meat Cutters

counted the cuts of meat on hand that had not been sold and subtracted that number from the comparable figure from the prior month, for example, from the first Wednesday of the month. The employees adjusted the numbers based on the weather. If the weather were warm, Meat Department employees would anticipate selling more meat that could be grilled outdoors; if cold, more pork, roasts and London broil would be cut. At the time of the hearing, Francisco Vargas had been preparing the cut lists for the previous approximately two weeks.

The Employer provides a manual that describes how various meats are to be sliced and how much fat to trim off the meat. For example, the Employer requires that meat products have no more than one-quarter inch fat. A Meat Cutter testified that he had not looked at the entire manual and that it was consulted only when there is a disagreement in the department over how to cut a piece of meat.

Meat Department employees cannot rework a piece of meat for a Club member. If a member wants a cut of meat that is not available, the member must place a special order for it. Mr. Pavlinko testified that special orders are infrequent, constituting only two to four percent of the Meat Department's business, mainly during the holiday season. A Meat Cutter who works the morning shift testified that the department receives ten to fifteen special orders daily.

The Meat Cutters perform little "boning," referring to removing a bone from a piece of meat. The only meat that requires boning is received in the Meat Department in the months of November and December. During those months, about two to five percent of the meat requires boning. The Meat Cutters do not "seam," referring to cutting a carcass or a large piece of meat into a round.

d. Employee Interchange, Contact and Transfers

No one substitutes for the Meat Cutters. Team Leader Vargas testified that during the past approximately five months, a demo associate from outside of the Meat Department has worked in the Meat Department two to three times a week for four hours. He did not describe her duties. One grocery employee helped out with wrapping in the meat room and stocking the cases for about a month during the past holiday season. One evening prior to one of the hearing dates, the same employee worked in the Meat Department preparing platters, cleaning and putting chicken in display cases. For the past two months, a maintenance employee from outside the Meat Department has worked in the Meat Department approximately once a week or every other week, a couple of hours at a time, when Meat Department employees had called out sick. About a week prior to the hearing, a maintenance employee from outside the Meat Department worked in the Meat Department for a couple of hours putting chicken in display cases.

Meat Department employees on the first shift infrequently work outside of their department. A Meat Cutter who works on the second shift testified that he has helped straighten product on shelves in the grocery and center areas when there is no cutting to be done in the Meat Department. Two to three times a week, he works with employees in various departments baling boxes. He also testified that about twice a week during the past four to five months, he rearranged dollies in the Club cooler, where milk and juice is kept, when the front dolly was empty. The Regional Fresh Manager testified that during the past two months, Meat Department employees have helped in the receiving area when the receiving area was crowded with deliveries.

About several times monthly, Demo Associates from the demo department ask Meat Department employees for suggestions for a meat to be offered as a sample in connection with another sample, such as a spice or a croissant. All employees, including Meat Department employees, frequently bring customers to departments other than the one they work in, including to the Meat Department, to obtain assistance for the customers.

There is a storewide safety committee addressing storewide issues that meets weekly. One Meat Cutter has attended some safety committee meetings.

Meat Department employees attend a voluntary Club meeting held daily at 9:30 AM at which Employer representatives discuss the Club's previous day's sales, safety record, shrinkage and whatever other subjects employees wish to discuss.

Three current Meat Department employees have previously worked in other departments at the Freehold Club. Meat Packager Leona Griffin worked as a people greeter at the front end of the Club while she was on light duty and thereafter returned to the position of Meat Packager. Meat Packager Brenda Heredia started as a cashier and transferred into the Meat Department. Team Leader Francisco Vargas began working at the Club as a Meat Cutter, transferred into the grocery department where he worked first as a Team Leader, then as a manager-in-training. He thereafter became a salaried Meat Department Manager at another club. He returned to the Freehold Club as a Meat Cutter and then became Meat Department Team Leader.

Current Meat Department Manager Cohen began working at the Club in the bakery department in an hourly position. He transferred from the bakery department to an hourly position in the produce department and then to an hourly position in the Meat Department before becoming Meat Department Manager.

Two former Meat Department employees have transferred to other departments. About a year ago, Ramon Molina transferred from the position of Meat Maintenance Associate to a Grocery Sales Associate. Within the past year, Yuri Churyumov transferred from his position as Meat Maintenance Associate to work in the grocery area as a Freezer/Cooler Associate.

III. LEGAL ANALYSIS AND DETERMINATION

1. The Scope of the Unit

Section 9(b) of the Act provides that “the Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof.” It is well established under Board law that the Act does not require that the unit for bargaining be the optimum or most appropriate unit, but only an appropriate unit. *Home Depot USA*, 331 NLRB 1289, 1290 (2000); *Overnight Transportation Co.*, 322 NLRB 723 (1996); *Dinah’s Hotel and Apartments*, 295 NLRB 1100 (1989); *Morand Brothers Beverage Co.*, 91 NLRB 409 (1950), enf’d, 190 F. 2d 576 (7th Cir. 1951). A union is not required to seek representation in the most comprehensive grouping of employees unless “an appropriate unit compatible with that requested does not exist.” *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963). Furthermore, in *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971), the Board explained that when no other labor organization is seeking a unit larger or smaller than the unit requested by the petitioner, the sole issue to be determined is whether the unit requested by the petitioner is an appropriate unit.

As discussed above, the Petitioner seeks a unit consisting solely of the employees who comprise the Employer's Meat Department. In *Wal-Mart Stores, Inc.*, 328 NLRB 904 (1999), the Board summarized the precedent applicable to determining whether a Meat Department is an appropriate unit in a larger facility:

The Board historically found that employees in Meat Departments constituted presumptively appropriate separate units because the meatcutters "exercised a broad range of traditional meat cutter skills marking them as craftspeople." As boxed meats have become more prevalent in the grocery industry, meatcutters have exercised fewer of the traditional craftsperson meat cutting skills, such as cutting whole animal carcasses into primal and subprimal sections, and boning, seaming, and trimming meats. Thus, in *Scolari's Warehouse Markets*, [319 NLRB 153 (1995)] the Board explained that meatcutters who worked primarily with boxed primal and subprimal meat did not warrant the presumption of appropriateness historically afforded to craftsperson meatcutters. The Board, however, has found that such meatcutters, together with other Meat Department employees, may still constitute a separate appropriate unit as measured by the Board's traditional community-of-interest factors. In determining whether Meat Department associates share a distinct community of interest, the Board examines the actual work performed by the meatcutters to determine if the processing of boxed primal and subprimal meats involves "substantial meat cutting skills which are distinct from the skills of other supermarket employees." In addition to examining the employees' skills, the Board looks to other community-of-interest factors to determine if the Meat Department employees share a community of interest with each other distinct from other employees in the store, with no one factor considered determinative. In *Scolari's*, community of interest among Meat Department employees was measured by whether: (1) the substantial portion of the Employer's Meat Department business involves boxed meat; (2) the continued application of specialized meat cutting skills is necessary for the processing of the boxed meat; (3) the meatcutters are highly trained; (4) a substantial percentage of the unit is engaged in skilled meat cutting work; (5) the unit is separately supervised; (6) there is limited interchange and transfers between Meat Department employees and other store personnel; and (7) employees in the proposed Meat Department unit receive higher wages than other store employees. (Notes omitted).

Based on the record in the instant matter, I find that the Meat Department employees employed by the Employer are not craftspersons of the type to which the Board will apply a presumption of the appropriateness of a separate craft unit. As described above, the Employer's Meat Cutters work on boxed meat that comes in subprimals, not from carcasses. Thus, the Employer's Meat Cutters, while they continue to possess and use distinct and

substantial meat cutting skills, do not exercise the degree of skill upon which the presumption was premised.

I next turn to the consideration of whether the petitioned-for unit is an appropriate unit based on the traditional community-of-interest criteria as described and applied in *Scolari's Warehouse Markets*, above.

a. Boxed Meat

In *Wal-Mart Stores, Inc.*, above, approximately 57.4 percent of the employer's meat sales consisted of boxed and ground meat. The ground meat constituted 30 percent of the sales. The Board noted that an unspecified amount of the ground meat came into the store already ground, wrapped and case-ready. The meat that required some cutting, such as fresh, boxed beef and pork constituted 26.4 percent of the Employer's sales. The Board determined that the meatcutters there spent a significant part of their time handling and cutting boxed meat. The Employer cites *Ashcraft's Mkt., Inc.*, 246 NLRB 471 (1979). There, two-thirds of the employer's meat was case-ready. The Board noted that the employer there did not receive sides of beef. The remaining third arrived frozen and required "simple trimming and cutting into smaller pieces."

In *Scolari's*, cited above, the Board noted that the approach in cases such as *Ashcraft's Mkt.*, above, was "overly restrictive."

More recently, in a number of cases, the Board has found that retail store meatcutters typically no longer exercised the full panoply of traditional meatcutters' skills. Meatcutters in these cases no longer handled carcass meat, but dealt only with boxed meat (primarily subprimals or smaller pieces) and/or case-ready meat, fish, and poultry. The Board concluded that since these meatcutters no longer needed to perform all the higher skilled tasks associated with their craft status, their skill level did not warrant applying the presumption that a unit limited to Meat Department workers was appropriate. [citing *Ashcraft's Mkt.* and *Great Day Inc.*, 248 NLRB 527 (1980)].

In the past, the Board often has used the term "boxed meat" as a short hand term indicating that little or no expertise was required in processing the meat, without discussing what the box contained or the work done by meatcutters in preparing the meat for retail sale. The use of boxed meat was not distinguished from the use of case-ready meat, but rather was contrasted with the use of sides of beef requiring the exercise of full journey-level skills. Thus, the Board in *Hall's [Super Duper]*, [281 NLRB 116 (1986),] noting that three-quarters of the meat was prepackaged and a quarter was boxed meat, stated that the meatcutters did not exercise traditional butchering skills but merely cut the delivered meats into smaller portions and trimmed the fat prior to the wrapper's weighing and measuring the meat. The Board did not analyze the skills necessary to handle the employer's boxed meat and, as indicated, made no distinction between processing boxed and case-ready meat. Similarly, in *Copps [Food Center]*, [301 NLRB 398 (1991),] the Board failed to detail the meat cutting skills necessary to handle the employer's boxed meat. The Board again presumed that the handling of boxed meat required little traditional meat cutting skill. Nor did the Board consider what percentage of the employer's meat cutting involved boxed meat.

Upon further consideration, we conclude that the Board's approach was overly restrictive. We find that when a significant amount of Meat Department work involves handling boxed meat, it is incumbent upon the Board to consider the actual work performed by the meatcutters in order to determine whether they continue to exercise substantial, traditional meat cutter skills.

Accordingly, I find that *Ashcraft Mkt.*, above, is not a reliable measure to determine whether the amount of boxed meat handled and cut by Meat Cutters here is significant. I find instead that the Board's determination in *Wal-Mart Stores*, above, indicates that the amount of such boxed meat at the Employer's Club, approximately 30 percent, is significant. Moreover, the first shift Meat Cutters spend almost all of their time processing meat and almost all the remaining Meat Cutters spend a majority of their time cutting meat.

b. Skills

In *Wal-Mart Stores*, above, the Board observed that the meatcutters there "utilize[d] equipment unique to the Meat Department" such as saws and knives. Meat cutting was done primarily with a band saw. After sawing, the meatcutters in *Wal-Mart* sometimes trimmed meat but "engage[d] in little or no seaming, edging, or angling of meat." The Employer

asserts that its Freehold Club Meat Cutters' lack of traditional skills is reflected by the fact that they do not determine which pieces to cut to maximize profit and do not regularly prepare custom cuts. I find that the Board has not determined that these characteristics are essential to a separate Meat Department unit. Rather, the Employer's Meat Cutters' skills are similar to those exercised in *Wal-Mart Stores*, above. I note that in *Scolari's*, above at 156, the Board acknowledged that the meatcutters there, who it determined possessed traditional meat cutting skills, cut large pieces of boxed beef into smaller pieces. Meat Cutters' testimony herein showed that it required at least six months to learn the Meat Cutter's job skills. Knowing how to recognize the boxed meat cuts and process these into the appropriate numerous cuts sold by the Club requires distinct skills, as further reflected in the fact that no one substitutes for the Meat Cutters. Moreover, all of the Meat Department employees work independently to a significant degree. Neither the Meat Department Team Leader nor the Meat Department Manager spends a majority of his time in the meat room, where most of the Meat Department work is done. The specialized skills required in cutting the meat products into retail cuts require the continued application of specialized meat cutting skills.

c. Training

While the Employer does not require prior experience, a fact it emphasizes, I find that the Board does not require that an appropriate Meat Department unit be composed of Meat Cutters who possess pre-hire experience. As stated above, it took one Meat Cutter approximately six months to learn his job. The Employer produced no evidence that it took its other associates a similar length of time to learn their jobs. I find that the Employer's Meat Cutters are highly trained.

d. Numbers of Skilled Employees

Of the fourteen employees, including the Team Leader,²⁸ there are five Meat Cutters. Thus, 36 percent of the Meat Department is skilled. In *Super K Mart Center*, 323 NLRB 582 (1997), where over 25 percent of the proposed unit engaged in specialized meat cutting skills, the Board found such to constitute a substantial portion of the unit. It further noted there that the meatcutters, while less than a majority of the Meat Department, were “central to the operation of the department” because they were “responsible, in large part,” for processing all of the non-case-ready product that the employer sold and were “engaged in the most critical parts of the operation of the Meat Department.” I find, similarly, that the Employer’s Meat Cutters, its meat processing employees, are similarly essential to its Meat Department and constitute a significant part of the department.

e. Supervision

Supervision at the Employer’s Club is centralized. The Club Manager is the final decision maker on decisions regarding hiring, discipline, evaluations, pay raises and terminations. However, the Meat Department has its own Manager, whose duties are not detailed in the record, although he spends fifteen to twenty percent of his time in the Meat Department. All parties agree that he is a Manager, excluded from the unit.

f. Interchange and Interaction

Interchange and interaction are limited. Rather, the Meat Department functions as a fairly integrated and isolated department. There is limited evidence of permanent transfers into the Meat Department from outside the Meat Department. The Meat Cutters are nonpareil and have no substitutes. Meat Department employees infrequently work outside of

²⁸ Below, I find the Team Leader to be an employee.

their Department. The functions performed in the Meat Department of cutting, grinding, wrapping and cleaning are closely related. Meat Department employees engage in certain common activities: grinding meat, checking and filling display cases, traying and wrapping meat, performing demos, assisting customers, cleaning and removing trash and baling boxes. Non-Meat Department employees work in the Meat Department infrequently, mainly during the holiday season.

When employees work in a store of this size, a certain amount of interaction is predictable. Here, the interaction is mainly incidental. The meat room is distinct and apart from other areas of the store and used exclusively by Meat Department employees. The temperature and sanitary conditions required in the meat room result in a work environment that is not hospitable to other employees. The limited interchange and interaction support a separate unit.

g. Wages and Benefits

The Meat Cutters are at a higher pay level than many other Club employees including: Deli Processor; Expanded Fresh Merchandiser; Food Handling; Cake Decorator; Fresh Demo Lead; Baker; Demo Associates; Rotisserie; Wrappers; Maintenance Associate; Floral Associate; Café Associate; and Tire Technician. Mostly Leaders and Managers populate the pay level above Meat Cutters. As was the case in *Scolari's Market Warehouse*, above, the degree of common benefits does not outweigh other factors that support the finding of a separate unit for the Meat Department.

h. Conclusion

As discussed above, the Employer's Meat Department employees meet the standards set forth in *Scolari's* for finding a separate Meat Department unit appropriate. While

management is centralized, other factors support a separate unit: a substantial portion of the Meat Department is engaged in distinctly trained, skilled work involving a significant amount of boxed meat that must be processed; there is limited interchange, transfer or interaction between the Meat Department employees and other store employees; and the Meat Cutters receive generally higher wages than other employees. In addition, the Meat Department employees work in a functionally integrated, separate and distinct area of the Club. I find that they share a community of interest, separate from other employees, sufficient to make the Meat Department employees a readily identifiable and homogenous group, distinct from other employees.

2. The Supervisory Issue

It is well-settled that the burden is on the party who asserts supervisory status to prove that the putative supervisor possesses at least one of the supervisory indicia listed in Section 2(11) of the Act: the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.²⁹ The Union asserts that Francisco Vargas exercises the supervisory authority to hire, assign, discipline and reward employees, and adjust their grievances. However, there was no evidence that Vargas has such authority. Although he has conducted the first interviews of prospective hires, there was not sufficient evidence that his comments, after performing the first interview, amounted to a hiring recommendation. If he made such recommendations, there was no evidence that his recommendations were followed.

²⁹ *Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-711 (2001).

Although he has written the first drafts of employee evaluations, there was no evidence of the use managers made of these drafts. His assignments and directions to employees failed to establish independent judgment; rather, his assignments and directions were routine, based on directions from his supervisor, and circumscribed by production requirements established by the Employer. There was no evidence that he possessed independent authority to discipline or reward employees or to adjust their grievances. Accordingly, the Petitioner has not sustained its burden to prove that Vargas is a statutory supervisor.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12

months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 464A, United Food and Commercial Workers International Union, AFL-CIO, CLC.**

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the voting groups found appropriate above shall be filed by the Employer with the Regional Director in Region 22, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey on or before **May 4, 2005**. No extension of time to file this list shall be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **May 11, 2005**.

Signed at Newark, New Jersey this 27th day of April 2005.

/s/ Gary T. Kendellen

Gary T. Kendellen
Regional Director
NLRB Region 22
20 Washington Place, Fifth Floor
Newark, New Jersey 07102